IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

WP(C).No. 30849 of 2007(R)

PETITIONER:

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1. ANILKUMAR V.N., S/O. NARAYANA KURUP,
"VARSHA", SONIA NAGAR,
PANATHIL PADAM ROAD,
EDAPPALLY P.O.

2. K.R.BIJU BABU, W/O. BABU K.M.,
D-28, CBI QUARTERS, KALOOR P.O., COCHIN.

BY ADV. SRI.S.SREEKUMAR
SRI.P.MARTIN JOSE

RESPONDENT:

HIGH COURT OF KERALA, REPRESENTED BY
ITS REGISTRAR (SUBORDINATE JUDICIARY),
ERNAKULAM.

BY ADV. SRI.KRB.KAIMAL (SR.)
SRI.B.UNNIKRISHNA KAIMAL

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 24/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V.GIRI, J.

W.P.(C).No.30849 of 2007 R

Dated this the 24th day of October, 2007.

JUDGMENT

The petitioners are functioning as Special Public Prosecutors for the conduct of cases instituted by Delhi Special Police in the trial court and appeals and revisions before the revisional and appellate courts. They were enrolled as Advocates on 12.10.1985 and 2.2.1987 respectively. While so, they were appointed as Public Prosecutors by the Central Government in exercise of its powers under Section 24 of the Code of Criminal Procedure (for short 'the Code'). The first petitioner was practising as an advocate in various courts, civil and criminal, until 1991 from 12.10.1985 to 18.4.1991 and the second petitioner was practising as an Advocate from 19.3.1987 to 15.4.2001. The respondent invited applications for appointment as District and Sessions Judges in the Kerala State Higher Judicial Service by direct recruitment. Clause 3 of Ext.P7 notification reads as follows:

"3. Qualification for appointment:

A candidate for appointment as District Judge from the Bar shall satisfy the following conditions:

(a) He shall be a Citizen of Indian Union.

(b) He shall not have completed 47 years of age on the first day of January, 2007.

© He shall be of good character.

(d) He shall be of sound health and active habits and free from any bodily defect or infirmity which renders him unfit fr such appointment.

(e) He shall not have more than one wife living unless exempted by the Government on special grounds.

(f) He shall be a practising Advocate and should have so practised for a period of not less than 7 (seven) years.

2. The petitioners submitted applications and originally hall tickets were issued. On further scrutiny, it was found that they were not eligible. Therefore, the hall tickets were withdrawn. Such withdrawal was intimated to the petitioner by Exts.P12 and P13 communications issued by the Registrar (Subordinate Judiciary). The reason given therein is that the petitioners have been in permanent employment of the Government, functioning as Public Prosecutors with the Central Bureau of Investigation and since they were not practising advocates on the date of

application, they were not eligible for being considered for appointment as District and Sessions Judges in the Kerala State Higher Judicial Service. It is the said stand taken by the respondent that is challenged by the petitioners in this writ petition.

3. In the counter affidavit filed by the respondent, it is contended that the petitioners, even according to them, are holding substantive posts of Public Prosecutors in regular full time service and therefore, they are not practising advocates. Reference is made in the counter affidavit to Rule 49 of the Bar Council of India Rules **{for short 'the Rules'}**. It is contended that a Bench of this court in the decision reported in **Biji v. Registrar {2001(3) KLT 99}** held that Assistant Public Prosecutors Grade II appointed by the State Government, are not practising advocates and that consequently, they were not eligible to be considered for appointment as Munsiff-Magistrates. The same principle applies in the case of District Judges also.

4. I heard Mr.S.Sreekumar, learned for the petitioner and learned senior counsel for the respondent Mr.K.R.B.Kaimal.

5. The writ petition has proceeded on the premise that Rule 49 of the Bar Council of India Rules which contemplates a bar of advocates negotiating in business or taking up any full time employment has carved out an exception in the case of law officers of the Central Government or of a State or any public corporation or body constituted under a Statute. Reference in this regard is made to the judgment of the Supreme Court reported in **Sushma Suri v. Govt. of National Capital Territory of Delhi {1999(1) SCC 330}**. Reference is also made to the subsequent judgment of the Supreme Court in **Satish Kumar Sharma v. Bar Council of Himachal Pradesh {AIR 2001 SC 509}** and the decision of a Bench of this court in **Biji v. Registrar, High Court of Kerala {2001(3) KLT 99}**. In the judgments aforementioned, the court was concerned with Rule 49 of the Rules, which prior to 22.6.2001 read as follows:

> **"Nothing in this rule shall apply to a Law Officer of the Central Government of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under section 28(2) (d) read**

> **with Section 24 (1)(e) of the Act despite his being a full time salaried employee.**
> **Law Officer for the purpose of this rule means a person who is so designated by the terms of appointment and who, by the said terms, is required to act and/or plead in courts on behalf of his employer."**

6. Construing Rule 49, the Supreme Court in the case of **Sushama** held that the bar under the first part of Rule 49 of the Rules will not apply in a case where as per the terms of engagement, a law officer has actually engaged in the act of pleading before the court. That is to say, if the law officer actually practices as an Advocate before the court, regardless of whether he is actually acting on behalf of one client, he, nevertheless should be treated as an advocate in terms of Rule 49 of the Rules. This conclusion is arrived at by the Supreme Court on a specific consideration of Rule 49 of the Rules, as it then stood.

7. Second part of Rule 49 was considered by the Supreme Court in the subsequent decision in **Santhosh kumar v. Bar council of Himachal Pradesh {AIR 2005 SC 509}.** The Supreme Court held that the exception given in favour of law officers of the State in terms of the second

part of Rule 49 of the Rules will enable such a law officer to nevertheless claim that he must be treated as a practising advocate only if there is an enabling provision in that regard, in the Rules framed by the State Bar Council under Section 29 read with Section 28 of the Act. On facts, it was found that there was no such enabling provision in the rules framed by the Bar Council of Himachal Pradesh and consequently a distinction was drawn by the Supreme Court from the dictum laid down in **Sushama's** case.

8. The Division Bench in **Biji** considered both the aforementioned decisions of the Supreme Court and went on to hold that the second part of 49 of the Rules does not apply to Assistant Public Prosecutors appointed under the special rules in Kerala.

9. In my view, even if Rule 49 of the Rules, as was considered by the Supreme Court and bench of this court in the aforementioned decisions, is considered, law officers appointed by the Central Government like the petitioners herein, can claim that they are practising advocates only if there is a specific enabling provision in that regard in the Rules framed by the concerned State Bar Council, under

which they have applied. Otherwise, the benefit of the exemption provided under rule 49 would not really be available.

10. Be that as it may, any doubt that may have lingered in this regard does not survive on account of the fact that Rule 49 of the Rules have been amended with effect from 22.6.2001. By the amendment paras 2 and 3 of Rule 49 have been deleted. In other words, Rule 49 reads as follows:

> **"An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment."**

11. The net effect is that an advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practice and shall, on taking up any employment, intimate the fact to the Bar council on whose roll his name appears. More importantly, the rules also provide that when he takes up

employment as a full time salaried employee, he shall cease to practice as an advocate so long as he continues in such appointment. Thus, a practising advocate cannot be a full-time salaried employee and a full-time salaried employee cannot be a practising advocate. There is no exception carved out in favour of any category including that of a law officer.

12. The upshot of the above discussion is that the petitioners are not practising advocates. The stand taken up by the respondent in Exts.P13 and P14 is correct and they are not entitled to apply for selection to the post of District and Sessions Judge .

13. I also take note of the contention of Mr.K.R.B.Kaimal, learned senior counsel that, at any rate, Rule 49 of the Rues must be construed in such a manner as to be consistent with Article 233(2) of the Constitution of India, which provides for appointment of District Judges, from persons who are not engaged in judicial service. Article 233 reads as follows:

“233. Appointment of District Judges: - (1) Appointments of persons to be, and the posting

and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

14. Elaborating on this aspect, it is contended that a person, to become eligible to be appointed as a District Judge on the strength of the fact that he is a practising advocate or a pleader, should not be in the service of the Union or of the State. In other words, a person who is in the service of the Union or of the State is not entitled to rely on the practice which he might have rendered as an advocate for being considered as eligible under Article 233(2) of the Constitution of India. If that be so, even if there was an exception carved out, under the Rules in favour of the law officers of the State as was probably available under Rule 49 of the Rules as it stood prior to 22.6.2001, it should have been read as subject to Article 233(2) of the Constitution. If it is so read, then eligibility obviously cannot be claimed by a

person de hors the general eligibility prescribed under Article 233(2) of the Constitution of India.

For all these reasons, I find no merit in this writ petition and the same is, therefore, dismissed.

Sd/-
(V.GIRI)
JUDGE

sk/

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P.S. To Judge.